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No.

Supreme Court, U.S.
FILED

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In The
Supreme Court of the United States

October Term, 1986

REUBEN PALMER, KEITH SYKES, JONATHAN
CHILDRESS, ALAN KENT, DENNIS WILLIAMS,
JAMES SAYLES, ERIC STANLEY,

Sub-Class A Plaintiffs,

EDWARD NEGRON, JACKIE WILSON, SHERYL
THOMAS, ANDREW WILSON, RICHARD HILLSON,
KEVIN FLEMING, a minor, ALFONSO ALVAREZ,
GLADSTONE THOMPSON, MARCUS CARR, MI-
CHAEL BROWN, MICHAEL MADDEN,

Sub-Class B Plaintiffs,

Petitioners,

vs.

CITY OF CHICAGO; RICHARD BRZECZEK, Superin-
tendent, Chicago Police Department; and Commander
MILTON DEAS,

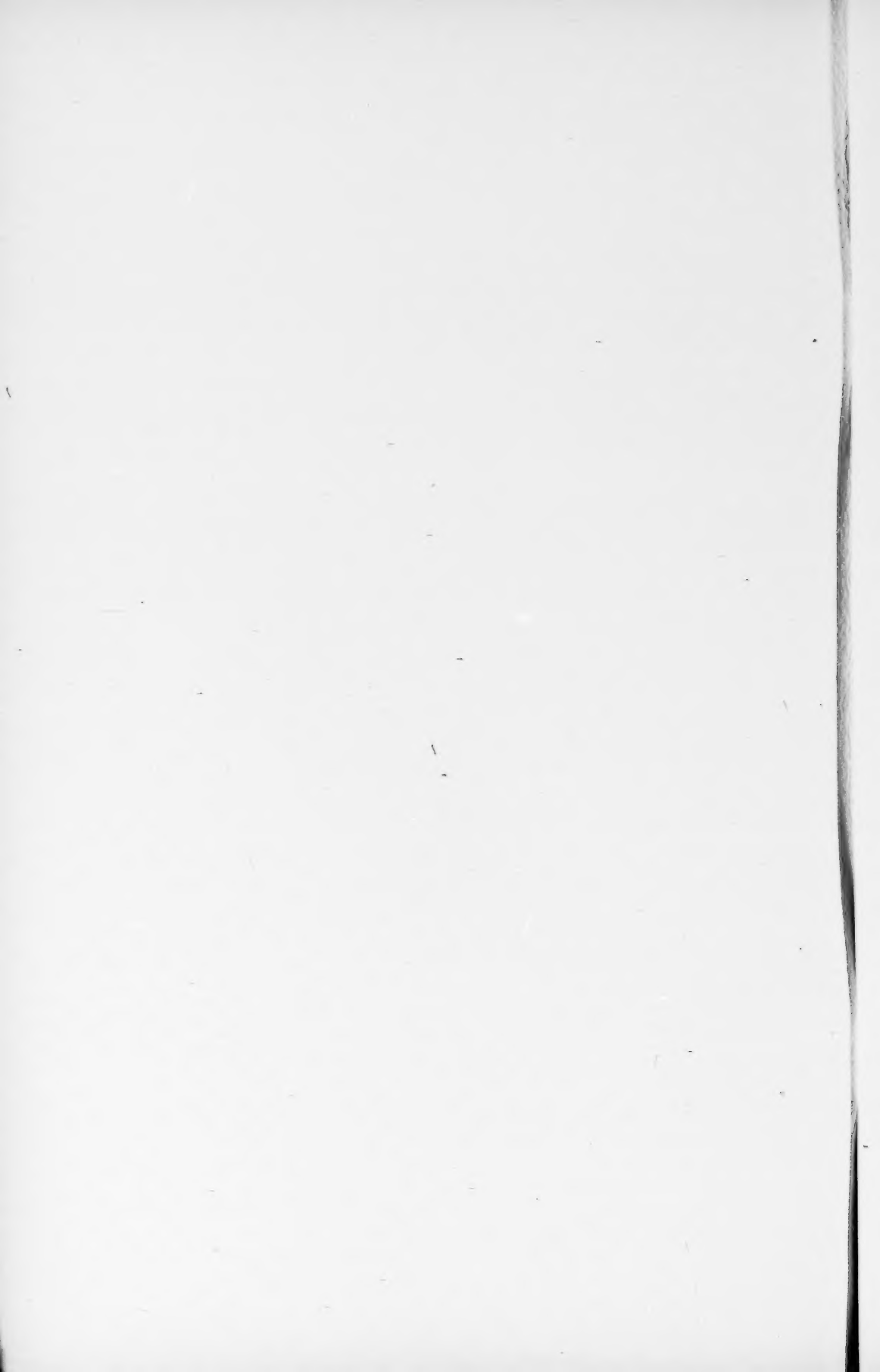
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT**

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QUESTION PRESENTED FOR REVIEW

Are the Plaintiffs deemed to be prevailing parties under 42 U.S.C. 1988, when their lawsuit is the catalyst for "substantial" and "permanent" informal relief, where the injunction sought and later obtained is ultimately reversed by the Court of Appeals on *Younger* abstention grounds without disturbing the District Court's finding of a constitutional violation?

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OPINIONS BELOW

The District Court's Opinion on the issue of attorneys fees, *Palmer v. City of Chicago* is reported at 576 F.Supp. 252 (N.D. Ill. 1983), and the Seventh Circuit's reversal of that Order, from which petitioners seek review in this Court, is reported at 806 F.2d 1316 (7th Cir. 1986). The District Court's decision of the merits is reported at 562 F.Supp. 1067 (N.D. Ill. 1983), while the Seventh Circuit's decision on the merits is reported at 755 F.2d 560 (7th Cir 1985).

JURISDICTION

Jurisdiction of this Court is found in 28 U.S. 1254(1). The order appealed from was entered by the Court of Appeals on November 26, 1986, and rehearing was denied on January 14, 1987.

STATUTE INVOLVED

This case involves the Attorneys Fees Award Act of 1976 (42 U.S.C. 1988) and the legislative history thereto:

In any action or proceeding to enforce a provision of sections 1977, 1978, 1980 and 1981, [1981, 1982, 1983, 1985, and 1986] of the Revised Statutes, Title IX of Public Law 92-318 [20 U.S.C. §§ 1681, *et seq.*] or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964 [42 U.S.C. § 2000d], the court, in its discretion, may allow

the *prevailing party*, other than the United States, a reasonable attorney's fee as part of the costs. (emphasis supplied).

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STATEMENT OF THE CASE

On April 8, 1982, Chicago Police Detective Frank Laverty came forward in the capital case of *People v. George Jones*, then on trial in the Criminal Courts of Cook County, and revealed compelling evidence that the Defendant on trial was the "wrong man." Called to testify at a special "voir dire" hearing, Laverty exposed that this highly exculpatory evidence was kept in secret police files, called street or office files, and that neither these street files nor their contents were provided to criminal defendants pursuant to discovery requests or subpoena. Pursuant to these dramatic disclosures, the trial Judge, citing police misconduct, granted a mistrial with prejudice and the prosecutor *nolle prossed* the case.

Plaintiffs' class* then filed suit in the Northern District of Illinois under 42 U.S.C. 1983 to enjoin the Defendants in this case from continuing their policy and practice of utilizing a dual filing system in order to avoid the strictures of *Brady v. Maryland*, 373 U.S. 83 (1963), and the Illinois Rules of Criminal Discovery, Ill. Supreme Court Rule 412 *et seq.* The District Court first entered a temporary restraining order which prevented the destruction

*The Class was divided into two subclasses: Subclass A which included all convicted felons, and Subclass B, which included all Defendants awaiting trial on felony charges.

of all remaining street files, and then later broadened the order when evidence was presented that the files were still not being properly preserved. In response, the Defendants implemented their own internal order, 82-2, which required preservation of all still existing files.

On October 29, 1983, the District Court conducted a week long hearing on Plaintiffs' request for a preliminary injunction. Several high ranking police officials testified, and evidence of an internal police audit of their street files practices was received. All this proof showed without contradiction the existence and operation of the "street files" practice as a device used to suppress exculpatory evidence. Defendant Area Police Commander Deas even admitted on the stand that he had subsequently recommended the redesignation of street files and their contents as the personal property of his detectives in order to avoid their retention and production as required by the TRO and 82-2.

Plaintiffs then called Defendant Chicago Police Superintendent Brzezczek to the stand. Confronted with the street file evidence, Brzezczek condemned the practice, admitted that all writings should be retained and those of an exculpatory nature produced, and that anything short of this violated both *Brady* and the Illinois discovery rules. In response to the Superintendent's testimony, and well before the District Court entered its preliminary injunction order, the Defendants issued a Special Order, 83-1 (see App. 33), binding on the entire Department. This Special Order established record keeping procedures which eliminated any further use of a dual filing system to hide exculpatory material—the heart of the relief Plaintiffs sought. When the Defendants would not agree to a formal order incorporating this directive, the Court issued a pre-

liminary injunction order which in some particulars extended beyond the Special Order in scope and detail. In support of this order, the Court made detailed findings of fact and conclusions of law which repeatedly underscored that Plaintiffs had made out a sufficient constitutional claim, under *Brady*, to support injunctive relief. Most significantly, it found that:

(Defendants' street file) practices before this action was instituted (see Findings 7-16) unquestionably created a grave risk of non-disclosure of exculpatory materials and hence of the violation of constitutional rights of the members of subclasses A and B—and those practices and risks have continued to exist. *Palmer v. City of Chicago*, 562 F.Supp. 1067, 1076 (N.D. Ill. 1983).

The Defendants then filed a Notice of Appeal while Plaintiffs sought 42 U.S.C. 1988 fees for obtaining the informal, yet permanent, relief of stopping the street files practices. The District Court found that Plaintiffs were the uncontested catalyst* for the "very substantial informal relief" obtained and were "comfortably within the Courts' expansive definition of prevailing party status regardless of the outcome of any further proceedings (including the appeal)" because:

... this action has caused major and *permanent* changes in Defendants' practices of retention and disclosure to criminal Defendants of potentially exculpatory evidence. Nothing in the pending appeal challenges the propriety of findings 17-20. On the contrary, on appeal Defendants assert their own imple-

*The Defendants had actually conceded this in their Brief on the merits, 576 F.Supp. at 255.

mentation of changes (triggered by this lawsuit) as the very predicate for arguing that the (preliminary injunction order) should not have gone beyond their 'voluntary' actions. Thus the uncontroverted findings confirm the concept that Plaintiffs have indeed prevailed by obtaining relief informally. 576 F.Supp. 253-4. (App. 16-17)

The court went on to reaffirm that its finding of prevailing party status was based on relief obtained "independently of the injunction," and was "unaffected by the procedural and jurisdictional arguments (which) Defendants advance on appeal", 576 F.Supp. 254, ft. note 4 (App. 17), and awarded nearly \$113,000 in fees.

In a two to one decision, the Seventh Circuit subsequently vacated the preliminary injunction, holding that Subclass A had no standing except on the issue of damages, and that the District Court should have abstained under *Younger v. Harris*, 401 U.S. 37 (1971), with regard to Subclass B:

The Subclass B Plaintiffs have presented this Court with no constitutional violation which the State Court is 'incapable of fairly and fully adjudicating', *Palmer v. City of Chicago*, 755 F.2d 560, 575 (7th Cir. 1985).*

On the appeal of the attorneys fees award, another panel of the Seventh Circuit reversed the District Court's award. Without upsetting the District Court's findings that the Plaintiffs' lawsuit was the catalyst for the informal relief and had raised meritorious constitutional

*Judge Cudahy, who dissented in part, also recognized the seriousness of the constitutional claim brought by Plaintiffs, 755 F.2d at 582, but argued that the Federal Court should address the violations, rather than abstaining.

claims, Judge Posner, writing for the panel, nonetheless held that the prior abstention ruling made Plaintiffs "losers" in the "legal" sense, regardless of the practical results they obtained. It is from this decision that petitioners seek review.

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REASONS FOR GRANTING THE PETITION

1. This petition presents an important question of first impression to this Court as to the appropriateness of conferring prevailing party status under 42 U.S.C. 1988 when a final determination of Plaintiffs' lawsuit is not reached on the merits yet Plaintiffs obtain permanent, informal relief. This case affords this Court the opportunity, for the first time, to establish the parameters of the "catalyst" theory of prevailing party status.

2. Further, the holding of this case creates a split in the Circuits as to the proper test for determining prevailing party status when a final determination on the merits is not determined but informal relief is obtained.

Other than the ~~ruling~~ in this case by the Seventh Circuit, all other Circuits which have addressed the catalyst issue have conferred prevailing party status despite no final determination on the merits when the litigation causes

some substantial benefit to the plaintiff.* The majority of the Circuits follow a two part test comprised of a factual and a legal component as set forth by the First Circuit in *Nadeau v. Hegemoe*, 581 F.2d 275 (1st Cir. 1978), i.e. whether the plaintiff's suit was causally related to the defendants' remedial actions and whether plaintiff's claim was colorable or non-frivolous. The Fifth Circuit has further defined this standard, holding that it is the defendant's burden to show that "their conduct was a wholly gratuitous response to a lawsuit which lacked colorable merit," to "demonstrate the worthlessness of plaintiffs' claims" and to "explain why he nonetheless voluntarily gave the plaintiff the requested relief." *Hennigan v. Ouachita Parish School Board*, 749 F.2d at 1153. The Third, Fourth and Eleventh Circuits simply require that the plaintiff establish a causal connection between the lawsuit and the remedial action taken by the defendant. See *Hennigan* (supra) at footnote 15. The instant decision, while recognizing that Plaintiff's litigation caused the re-

**Environmental Defense Fund, Inc. v. EPA*, 716 F.2d 915, 919 (D.C. Cir. 1983); *Nadeau v. Hegemoe*, 581 F.2d 275 (1st Cir. 1978); *Disabled in Action of Pennsylvania v. Pierce*, 789 F.2d 1016 (3rd Cir. 1986); *Morrison v. Ayoob*, 627 F.2d 669 (3rd Cir. 1980); *Bagby v. Beal*, 606 F.2d 411 (3rd Cir. 1979); *Bonnes v. Long*, 599 F.2d 1316 (4th Cir. 1979); *Hennigan v. Ouachita Parish School Board*, 749 F.2d 1148 (5th Cir. 1985) (and cases cited in footnote 15); *Robinson v. Kimbrough*, 620 F.2d 468 (5th Cir. 1980); *Johnston v. Jago*, 691 F.2d 283, 286 (6th Cir. 1982); *Williams v. Leatherbury*, 672 F.2d 549 (5th Cir. 1982); *Harrington v. DeVito*, 656 F.2d 262 (7th Cir. 1981); *United Handicapped Federation v. Andre*, 622 F.2d 342 (8th Cir. 1980); *American Constitutional Party v. Monroe*, 650 F.2d 184 (9th Cir. 1981); *Pomerantz v. County of Los Angeles*, 674 F.2d 1289, 1293 (9th Cir. 1982); *J. and J. Anderson Inc. v. Town of Erie*, 767 F.2d 1469, 1475 (10th Cir. 1985); *Fields v. Tarpon Springs*, 721 F.2d 318, 321 (11th Cir. 1983).

lief requested and was not frivolous, nonetheless refused to apply the catalyst test adopted by all the other Circuits.

The panel below attempted to guise its radical departure from all catalyst precedent and from utilizing the catalyst test by reasoning that Plaintiffs ultimately “lost” on the merits of their claim due to the Seventh Circuit’s prior holding of abstention under *Younger v. Harris*, *supra*. As a matter of law, the abstention ruling was not a “loss” on the merits as the panel would have it, but rather a discretionary determination not to exercise jurisdiction and to defer to state court jurisdiction despite a recognized constitutional violation.* Plaintiffs’ situation is closely analogous to one where informal relief is obtained and the case is subsequently dismissed for lack of jurisdiction, for mootness, or on motion of the Plaintiff—all situations where the lower courts have held that fees are appropriate under the catalyst test. See, e.g.: *Kopet v. Esquire Realty*, 523 F.2d 1005, 1007-8 (2nd Cir. 1975); and *Thomas v. Honeybrook Mines*, 428 F.2d 981, 984-86 (3rd Cir. 1970), as cited in the Senate Report 94-1011 (1976) at p.5; *Hennigan v. Ouachita Parish* (*supra*); *Williams v. Alioto*, 626 F.2d 625 (9th Cir. 1980); *Grano v. Berry*, 783 F.2d 1104 (D.C. Cir. 1986); *Knighton v. Watkins*, 616 F.2d 795 (5th Cir. 1981); *Ortiz de Arroyo v. Barcelo*, 765 F.2d

*While Plaintiffs have found no cases which address the award of fees where a Court ultimately defers to the state courts under the *Younger* abstention doctrine, courts have uniformly allowed an award of fees for the work performed in state court pursuant to *Pullman* abstention. See: *Bartholomew v. Watson*, 665 F.2d 910 (9th Cir. 1982); *Exeter-West Greenwich School v. Pontarelli*, 788 F.2d 47, 51 (1st Cir. 1986); *Lampher v. Zagel*, 755 F.2d 99 (7th Cir. 1985).

275 (1st Cir. 1985); *Clark v. City of Los Angeles*, 803 F.2d 987 (9th Cir. 1986).

The panel's characterization that Plaintiffs "lost" the case, (i.e. an adverse ruling on the merits), is also wrong because it ignores the fact that Plaintiffs obtained substantial, permanent, informal relief as well as a District Court finding that Defendants' practices were unconstitutional, which was implicitly upheld on appeal. See *Grano v. Berry* (supra). This is winning rather than losing in the "practical" sense, as the Seventh Circuit begrudgingly recognized, 806 F.2d at 1323, and the practical results are the paramount consideration in catalyst cases, see: *Aubin v. Fudale*, 782 F.2d 287, 291 (1st Cir. 1986) ("victory in a civil rights case is typically a practical, rather than a strictly legal matter") and *Hennigan* (supra) at 1152.

Under any objective application of the catalyst test, Plaintiffs are entitled to prevailing party status. The Court of Appeals' ultimate determination that the suit should have been brought in state court is of no legal significance for the purpose of awarding Sec. 1988 fees.

3. This Court should also grant this petition because the Seventh Circuit's decision ignores the express legislative history of the Act and the principles announced by this Court in *Maher v. Gagne*, 448 U.S. 122 (1980). This Court has always given great deference to the Act's legislative history in construing 42 U.S.C. 1988, see e.g.: *Hutto v. Finney*, 437 U.S. 678, 694 (1978); *New York Gaslight v. Carey*, 447 U.S. 54, 66 (1980); *Maher v. Gagne*, 448 U.S. 122, 129 (1980); *Hensley v. Eckerhart*, 103 S.Ct. 1033, 1337-8 (1983); *Blum v. Stenson*, 77 L.Ed.2d 891, 898-9 (1984); *City of Riverside v. Rivera*, — U.S. —, 91 L.Ed.2d 466, 486

(1986); *N.C. Dept. of Transportation v. Crest St. Council*, — U.S. —, 107 S.Ct. 336, 340 (1986).

The portion of the legislative history which is directly on point to Plaintiffs' prevailing party status in the case at bar is as follows:

... parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. S. Rep. No. 94-1011 p.5 (1976) (citing *Kopet v. Esquire Realty Co.*, 523 F.2d 1005 (CA2 1975); *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (CA8 1970); *Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981 (CA3 1970); *Richards v. Griffith Rubber Mills*, 300 F.Supp. 388 (Ore. 1969); *Aspira of New York, Inc. v. Board of Education of New York City*, 65 F.R.D. 541 (S.D.N.Y. 1975).

* * *

If the litigation terminates by consent decree, for example, it would be proper to award counsel fees. A 'prevailing' party should not be penalized for seeking an out-of-court settlement, thus helping to lessen docket congestion. Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. H.R. Rep. No. 94-1558, p.7 (1976) (citations omitted) (emphasis supplied).

(As cited in *N.C. Dept. of Trans. v. Crest St. Comm. Council*, *supra*, 107 S.Ct. at 340.)

This exact portion of the legislative history was previously relied upon by this court in *Maher v. Gagne* (*supra*) at 129; and again, in *North Carolina Transport v. Crest St. Comm. Council* (*supra*) at 340. Most significantly, the first three cases cited by the Senate Report as examples of prevailing party status where informal relief is obtained are without real distinction with the case at bar and

therefore completely undercut the panel's holding that a decision of abstention which leaves standing a lower court holding of unconstitutionality after substantial, permanent, informal relief has been compelled by the litigation, does not amount to prevailing party status under 42 U.S.C. § 1988.*

Moreover, in *Maier v. Gagne*, this Court held that a plaintiff had prevailed where she had obtained a consent decree on her statutory claim, even though her constitutional claims were not reached, because those claims were sufficiently substantial to support federal jurisdiction. While *Maier* concerned formal relief, its holding concerning the constitutional claim is the same as the *Nadeau* "colorable" and "non-frivolous" prong of the catalyst standard. The *Maier* test must therefore be applied to Plaintiffs' case, and if so applied, it is clear that Plain-

*The three pertinent cases cited as examples by the Senate Report as most recently reaffirmed by this Court in *N.C. Transportation* hold as follows:

1. *Kopet v. Esquire Realty Co.*, 523 F.2d 1005, 1007-1008 (2nd Cir. 1975), holds that fees may be awarded for relief informally obtained as a result of claims which were ultimately dismissed for lack of pendent jurisdiction;

2. *Thomas v. Honeybrook Mines*, 428 F.2d 981 (8th Cir. 1970), holds that although plaintiffs' first suit was ultimately dismissed on jurisdictional grounds, they were entitled to fees for pursuing it because that suit was instrumental in prodding the original defendants to act.

3. *Parham v. Southwestern Bell Co.*, 433 F.2d 421 (8th Cir. 1970), holds that although plaintiff's request for back pay and class injunctive relief under Title VII was denied, plaintiff was entitled to fees as a prevailing party for his counsel's work at trial and on appeal because he had obtained a finding of previous racial discrimination and acted as a catalyst in causing informal changes by defendant-employer.

tiffs made out a sufficiently substantial constitutional claim to be deemed prevailing under *Maier*.

Wherefore, this petition should be granted because it raises a question of first impression in this Court and seeks to resolve a split in the Circuits which was occasioned by the panel's misguided decision below. Additionally, this Court should grant the petition so that it can properly apply the express legislative history of 42 U.S.C. § 1988 and the *Maier* decision to catalyst cases where informal relief is obtained.

Respectfully submitted,

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Dated: March 16, 1987

App. 1

Reuben PALMER, et al., Subclass A Plaintiffs,

and

Edward Negron, et al., Subclass B Plaintiffs,

v.

CITY OF CHICAGO, et al., Defendants.

No. 82 C 2349.

United States District Court,
N.D. Illinois, E.D.

Nov. 18, 1983.

* * *

MEMORANDUM OPINION
AND ORDER

SHADUR, District Judge.

In the latest chapter of this "Chicago Street Files" case, plaintiffs move under 42 U.S.C. § 1988 ("Section 1988") for entry of an interim award of attorneys' fees and expenses against defendants.¹ Because (1) plaintiffs qualify as "prevailing" under Section 1988 regardless of the outcome of the pending appeal² and (2) an interim fee

1. Defendants comprise:

1. "City Defendants": City of Chicago, former Superintendent of Police Richard Brzeczek and Detective Division Area 2 Commander Milton Deas, and

2. "County Defendants": Cook County State's Attorney Richard M. Daley and various of his deputies and assistants: Chief Deputy William Kunkle, former Assistant in charge of the Felony Review Division Lawrence Hyman, and Assistants Daniel Locallo and James Varga.

2. This Court's preliminary injunction opinion and order, 562 F.Supp. 1067 (N.D.Ill.1983) (the "Opinion") is now on appeal to our Court of Appeals in Nos. 83-1980 and 83-1981.

App. 2

award is appropriate in light of principles recently announced in *Hensley v. Eckerhart*, — U.S. —, 103 S.Ct. 1932, 76 L.Ed.2d 40 (1983), this Court awards interim attorneys' fees for plaintiffs' counsel's already-successful efforts that by definition cannot be negated on appeal.

Jurisdiction

County Defendants challenge this Court's jurisdiction to consider the fees issue. That argument is not even specious—certainly not in this Circuit, and likely not in any federal court anywhere. Even in the situation in which a district court has rendered a *final* judgment—the classic situation in which an appeal from that judgment is viewed as ousting the district court of jurisdiction to do anything further—the specific teaching of our Court of Appeals is exactly to the contrary as to attorneys' fees awards in civil rights cases. That subject was discussed at length by the Court “in the exercise of our supervisory powers” (623 F.2d at 29) in *Terket v. Lund*, 623 F.2d 29, 33-34 (7th Cir.1980). After an extended analysis of the policy considerations involved, the Court concluded (*id.* at 34):

In sum, we believe the rule in *Wright [v. Jackson]*, 522 F.2d 955 (4th Cir.1975) is more likely to cause delay and wasted effort than prevent it. Therefore, district courts in this circuit should proceed with attorneys' fees motions, even after an appeal is filed, as expeditiously as possible. Any party dissatisfied with the court's ruling may then file an appeal and apply to this court for consolidation with the pending appeal of the merits.

Since that time the *Terket* rule, allowing (indeed directing) the award of attorneys' fees after an appeal has been taken, has been approved implicitly by the Supreme


Court. *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 452-53 n. 14, 454, 102 S.Ct. 1162, 1166-67 n. 14, 1168, 71 L.Ed.2d 325 (1982). *White* was relied on for precisely that proposition by the Court of Appeals for the Ninth Circuit only last month in *Masalosa-lo v. Stonewall Insurance Co.*, 718 F.2d 955 (9th Cir.1983), specifically rejecting *Wright* and electing to follow *Terket* and the Eighth Circuit's like ruling in *Obin v. District No. 9 of the IAM*, 651 F.2d 574 (8th Cir.1981).

This Court would—in accordance with the *Terket* directive from our Court of Appeals—thus have jurisdiction to consider and rule on plaintiffs' fees motion even had it rendered a *final* judgment from which an appeal was taken. It perforce has such jurisdiction a fortiori where the appeal is only interlocutory, a situation in which the concept of ouster of the district court's further jurisdiction is far more limited. It is really untenable for County Defendants to argue from older Seventh Circuit law, decided in a wholly different context, that this Court lacks the power our Court of Appeals has squarely and expressly confirmed.³

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3. Even on their own terms County Defendants would be dead wrong. They purport to rely on *United States v. City of Chicago*, 534 F.2d 708, 711 (7th Cir.1976), which holds:

An appeal from an interlocutory order does not divest the trial court of jurisdiction to continue deciding other issues involved in the case.

This order does not award fees for efforts that resulted only in the preliminary injunction, nor does it presuppose the preliminary injunction will be upheld on appeal. Accordingly this Court would in any case have jurisdiction over plaintiffs' motion as an "other issue" under *City of Chicago*.



"Prevailing Party" Status

Section 1988 permits courts to award attorneys' fees to "the prevailing party" in federal civil rights actions. "Prevailing" is defined broadly, and *Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 2574, 65 L.Ed.2d 653 (1980) confirms (in accordance with the Senate Report in enacting Section 1988) a plaintiff can prevail "without formally obtaining relief." Relief need not be substantial but may even provide only a "moral vindication" of the correctness of plaintiff's position. *Knighton v. Watkins*, 616 F.2d 795, 799 (5th Cir.1980). When the relief obtained is not formal, "the plaintiffs' lawsuit must be causally linked to the achievement of the relief obtained" and "the defendant must not have acted wholly gratuitously, i.e., the plaintiffs' claims, if pressed, cannot have been frivolous, unreasonable, or groundless." *Harrington v. DeVito*, 656 F.2d 264, 266-67 (7th Cir.1981).

Plaintiffs are comfortably within the courts' expansive definition of "prevailing party" regardless of the outcome of any future proceedings (including the pending appeal), for they have in fact obtained very substantial informal relief. Opinion's Findings of Fact ("Findings") 17-20, 562 F.Supp. at 1072-75, establish this action has caused major and *permanent* changes in defendants' practices of retention, and disclosure to criminal defendants, of potentially exculpatory evidence. Nothing in the pending appeal questions the accuracy of Findings 17-20. On the contrary, on appeal both sets of defendants assert their own implementation of changes (triggered by this lawsuit) as the very predicate for arguing the Opinion should not have gone beyond their "voluntary" actions. Thus the uncontro-

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verted Findings confirm the concept plaintiffs have indeed "prevailed" by obtaining relief informally.⁴

Propriety of Interim Fees

Inquiry does not however end with the threshold determination of "prevailing party" status. *Hensley* teaches (103 S.Ct. at 1940) fee awards may be adjusted upward or downward in light of other factors, especially "the im-

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4. City Defendants say plaintiffs no longer will qualify as "prevailing" if the preliminary injunction is overturned on appeal, citing *Doe v. Busbee*, 684 F.2d 1375 (11th Cir.1982). In *Doe* the District Court had found plaintiffs prevailed even though the injunction they obtained was vacated as a result of newly issued Supreme Court opinions. On appeal that finding of prevailing party status was reversed, 684 F.2d at 1382 (footnote omitted):

Plaintiffs argue that the abortions received under the injunctions issued by the district court are evidence that they were successful in achieving the primary relief sought by bringing the litigation. However, as we have indicated above, these benefits flowed from orders of the district court that were entered under a mistake of law. . . . Under these circumstances, plaintiffs may not properly be considered to have vindicated a civil right as contemplated by Congress in § 1988, since in fact they had no right to the relief sought and obtained. We therefore conclude that they are not prevailing parties.

Doe is inapposite for two reasons:

1. In *Doe* plaintiffs sought "prevailing party" status because of relief obtained by the injunction. Plaintiffs here are entitled to "prevailing party" status because of relief obtained independently of the injunction.

2. In *Doe* plaintiffs' relief was based on a "mistake of law." Here the right of criminal defendants to full discovery pursuant to *Brady v. Maryland*, 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215] (1963) is uncontested. Plaintiffs' success as asserted in the current motion, is based on that right and is unaffected by the procedural and jurisdictional arguments defendants advance on appeal.

portant factor of the 'results obtained,' " which is "particularly crucial where a plaintiff is deemed 'prevailing' even though he has succeeded on only some of his claims for relief." It goes on (*id.* at 1941) to invite District Courts to "attempt to identify specific hours that should be eliminated" to conform the fee award to plaintiffs' degree of success. Thus *Hensley* requires plaintiffs to be compensated for successful but not futile efforts.

Plaintiffs invoke *Hensley's* fee determination principles to obtain current payment of the amount below which their fee award will not fall even under the worst possible scenario. Because plaintiffs will receive at least that amount in the end, they ask it be awarded now. Their position is unassailable. Plaintiffs are "prevailing" and have engaged in successful efforts for which they will inevitably be compensated. Their attorneys have spent hundreds of hours on the case without pay, and it may be years before a final evaluation of their success in every phase of the case can be made. Moreover *Hanrahan v. Hampton*, 446 U.S. 754, 757, 100 S.Ct. 1987, 1989, 64 L.Ed. 2d 670 (1980) (per curiam) expressly authorizes fee awards *pendente lite*.⁵

5. *Hanrahan (id.)* cited the House Committee Report's approval of the Court's earlier statements in *Bradley v. Richmond School Board*, 416 U.S. 696, 723 n.28, 94 S.Ct. 2006, 2022 n.28, 40 L.Ed.2d 476 (1974):

[T]he entry of any order that determines substantial rights of the parties may be an appropriate occasion upon which to consider the propriety of an award of counsel fees. . . .

That of course requires plaintiffs to prevail "on the merits" (*Hanrahan*, 446 U.S. at 757, 100 S.Ct. at 1989) rather than on some procedural aspect of the case. Here the informal relief obtained is "on the merits" because it sharply enhanced retention and disclosure to criminal defendants of exculpatory materials, as requested in the Complaint.

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Amount of the Fee Award

Even on a worst-case basis a substantial amount of plaintiffs' attorneys' hours to date have supported successful efforts for which *Hensley* entitles them to compensation. All their time spent through October 29, 1982 led up to and triggered the informal relief describe in Findings 17-20. City Defendants themselves acknowledge in their appeal (Br. 13-14, citations to record omitted):

After [then Police Superintendent] Brzeczek's testimony [on October 29, 1982], the Court adjourned the hearing to allow the parties to attempt to resolve the litigation. The CPD immediately issued a telex to its areas consistent with the Superintendent's position. The CPD also prepared a draft detective division notice incorporating new record-keeping practices implementing the Superintendent's declared policy.

That Chicago Police Department telex and draft detective division notice are part and parcel of the informal relief that forms the basis for this order.

Thereafter plaintiffs rejected defendants' measures as inadequate to solve the problems they perceived, and they returned to this Court for resumption of their preliminary injunction proceedings. Those added efforts were successful before this Court, but their ultimate success is not yet assured (because of the pending appeal). In view of that uncertainty, this order limits its award of reasonable attorneys' fees to plaintiffs to cover only the efforts expended by their attorneys through October 29, 1982.

Plaintiffs' attorneys have provided extensive documentation of their time spent and the purposes to which the time was devoted. Their documentation includes both a daily time catalog for each attorney (filed July 29, 1983)

and a subject matter breakdown for each attorney and each phase of the litigation (filed November 15, 1983). In addition they provided copies of their original timesheets to defendants and now this Court (filed November 16, 1983).

Defendants' objections to the fee request are vague and generalized, alleging for example (City Def. Mem. 8) "pretrial uncertainties on the part of Plaintiffs' counsel." Plaintiffs' attorneys however have not submitted fee requests for hours spent on duplicative efforts,⁶ and they have invited a further deduction in the interests of fairness (Motion ¶6):

6. Given the fact that Plaintiffs employed two to four lawyers throughout the litigation, we suggest that a reduction of hours—perhaps 10% might be appropriate to account for unavoidable duplication.

This Court finds plaintiffs' attorneys have made "a good faith effort to exclude from [their] fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission" (*Hensley*, 103 S.Ct. at 1939-40).

Plaintiffs' submission (including their attorneys' detailed affidavits as to their qualifications, plus the affidavits of other attorneys in private practice) also convincingly supports the reasonableness of the requested

6. Plaintiffs state (Fees Motion 3 n. *):

Some hours—such as Taylor's attendance at the injunction hearing—having [sic] already been eliminated in the interest of avoiding the appearance of duplication. Moreover, Assistant Public Defender Robert Isaacson has not billed for his hours.

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hourly rate of \$135 for each lawyer. This Court has given full consideration to all the factors mandated by our Court of Appeals, and that \$135 figure represents a conservative award for the aggregate of time spent both in and out of court. Although it is of course *permissible* for lawyers and law firms to perpetuate the custom of charging a premium for in-court time (the legal equivalent of combat pay during wartime?), it cannot fairly be said to be *mandated* in light of the dramatic changes in timekeeping and billing practices since that custom first arose.⁷ See *Strama v. Peterson*, 561 F.Supp. 997, 1000 n. 7 (N.D.Ill.1983).

It may well be that plaintiffs might ultimately be entitled to a multiplier for the time included in the current award. That fact however (and a fortiori the amount of any possible multiplier) can be better evaluated at a later stage in this litigation—certainly at least when the pending appeal is resolved. Again in the interest of conservatism—imposing on defendants an amount awardable against them in all events—no multiplier will be awarded now. Judgment is simply reserved on that subject.

7. When this Court was in private practice his firm established a normal billing rate for each lawyer, chargeable irrespective of the nature of the services devoted to billable matters (and in the case of litigators, that rate applied to in-court and out-of-court time alike). That practice is typical of most of the firms with which this Court is familiar. And lest it be thought this is simply an application of some sort of judicial notice, it should be emphasized that the uncontroverted evidence here (the affidavits of other lawyers, tendered by plaintiffs) does not require—or even support—the distinction urged by defendants.

Conclusion

Under the principles announced in this opinion, the calculation of the appropriate awards appears to be as follows:⁸

<u>Attorney</u>	<u>Hours</u>
Haas	432.50
Deutsch	291.50
Cunningham	208.65
Taylor	30.15
	<hr/>
TOTAL	962.80

$$\$135 \times 0.9 \times 962.80 = \$116,980.20$$

All parties are directed to file on or before December 5, 1983 their statements as to (1) whether that calculation reflects any arithmetical error, (2) the proper allocation as between City Defendants and County Defendants and the reasons supporting the proposed allocation and (3) the proposed payment date (also including a statement of any justification for requested delay). This Court will promptly issue an order for payment.

APPENDIX

On November 17, 1983 (literally the day before the status hearing at which this Court's ruling was scheduled to be announced, and after the foregoing opinion had already been prepared) both sets of defendants submitted (without asking leave of court) additional objections to plaintiffs' fees request. Those submissions thus had not

8. All the parties are invited to verify these figures to make certain they are properly drawn from plaintiffs' submissions.

been called to this Court's attention before the opinion date, and this Court has been provided no explanation whatever as to why defendants' current objections were not brought to the Court's attention much earlier.¹

Nonetheless this Court has considered defendants' belatedly-tendered objections, and it has determined the foregoing opinion as already drafted dealt with all but three of defendants' arguments.² Those new and unaddressed issues were:

1. Plaintiffs may lose the pending appeal on the ground there is no "case or controversy" involving them. If that were to occur, it was not plaintiffs but some unspecified others who prevailed (City Nov. 17 Mem. 2).

2. Specific hours were spent in unjustifiably hampering defendants' discovery efforts and should not be compensated (*id.* at 3-4).

3. Other unidentified duplication of time was reflected in plaintiffs' submissions (County Nov. 17 Mem. 2).

City's first argument deserves short shrift. Plaintiffs' attorneys represent a class, not just the named plaintiffs. If the class action is procedurally defective as claimed (and for current purposes this Court need not ad-

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1. Plaintiffs' counsel apparently provided defendants' counsel with the time records supporting their motion a few months ago, promptly after the motion was filed. Yet as already said there was no indication to this Court of any issues in dispute (except as covered by the parties' previously-filed legal memoranda) until the day before the foregoing opinion was due to be issued.
 2. See the last paragraph of this Appendix for a further possible exception, as to which this Court considers the failure to make a timely submission constitutes a waiver.

dress such cases as *United States Parole Commission v. Geraghty*, 445 U.S. 388, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980) and *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975) on that score), such a defect does not deprive plaintiffs of success based on informal relief unless the claim was "frivolous, unreasonable, or groundless," *Harrington*, 656 F.2d at 267, in the first instance. Because plaintiffs' claim for preliminary relief *beyond* the scope of defendants' October 29, 1982 telex order was ultimately successful in this Court plaintiffs' claim that triggered that telex (which marks the watershed for the current award) was a fortiori not "groundless."

As for the other two contentions, under the circumstances already described this Court might well hold them waived as untimely filed. Certainly that finding is justifiable—and is hereby made—as to City Defendants' other arguments under "Rates" (Nov. 17 Mem. 4-6), for City Defendants do not even suggest any justification for having previously failed to address those known questions on the reasonable briefing schedule established by this Court. However, this Court will grant the request for a hearing on the second and third numbered sections identified two paragraphs back. This case is set for a status conference at 9 a.m. December 9, 1983 to discuss the scheduling of that hearing.³

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Reuben PALMER, et al.,
Plaintiffs-Appellees,

v.

CITY OF CHICAGO,
Defendant-Appellant.

No. 84-2943.

United States Court of Appeals,
Seventh Circuit.

Argued Oct. 29, 1986.

Decided Nov. 26, 1986.

* * *

Michael E. Deutsch, Chicago, Ill., for plaintiffs-appellees Reuben Palmer, et al.

Before BAUER, Chief Judge, and CUMMINGS and POSNER, Circuit Judges.

POSNER, Circuit Judge.

The City of Chicago has appealed from an order that it pay \$113,000 in interim attorney's fees to the plaintiffs in this civil rights case. The award of fees was made under the authority of 42 U.S.C. § 1988, which authorizes the award of reasonable attorney's fees to "prevailing" parties. The question we are asked to decide is whether, for purposes of section 1988, you can win by losing. But we cannot reach that question without first satisfying ourselves that the order to pay is appealable.

The suit is a class action under section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983. Brought in 1982 on behalf of state criminal defendants and convicts in Chicago, it challenges the constitutionality of the Chicago police department's alleged practice of concealing exculpatory material collected in criminal investigations, and lodged in the

department's informal "street files." The district court issued a temporary restraining order directing the city to preserve such material pending decision on the plaintiffs' motion for a preliminary injunction. In compliance with this order the city adopted retention procedures that in 1983 the district court by a preliminary injunction required the city to continue and in certain respects amplify. 562 F.Supp. 1067 (N.D.Ill.1983). Later that year the court awarded the plaintiffs \$117,000 (subsequently reduced to \$113,000) in attorney's fees for work done to obtain the preliminary injunction. 576 F.Supp. 252 (N.D.Ill. 1983). A year later the court ordered the city to pay the \$113,000 immediately, 596 F.Supp. 1060 (N.D.Ill.1984), and it is from that order that the city appeals.

Meanwhile the city had appealed from the grant of the preliminary injunction, and in 1985 this court reversed. 755 F.2d 560 (7th Cir.1985). We held that class members who had already been convicted had no standing to seek an injunction against the city's practice; it could do them no good. If they wished to complain about their convictions, their remedy was to apply for habeas corpus. *Id.* at 571-72. With regard to class members who were awaiting trial, we held that the principle of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), barred the injunction; their proper remedy against concealment of exculpatory material would be to raise a constitutional defense in the pending state criminal proceedings. 755 F.2d at 576. We also held, however, that the convicted defendants were entitled to a preliminary injunction (patterned on the temporary restraining order) directing the city to preserve the defendants' files until the defendants could discover whether they had any basis for mounting a collateral attack

on their convictions or for obtaining damages under section 1983 for violation of their constitutional rights. *Id.* at 573, 577. We remanded the case for the entry of a suitable injunction.

With the case back in the district court, the plaintiffs' lawyers inspected the files but found nothing on which they could base a claim that any member of the class had been convicted in violation of the Constitution. The lawyers say they think the files were "stripped" of all exculpatory materials, but do not propose to try to prove this. Eventually the city moved to dismiss the case for want of prosecution. The motion was granted; and although it seems that no judgment dismissing the suit was actually entered, and although the plaintiffs filed a motion to reinstate the suit, at argument their counsel acknowledged that they did not intend to pursue the case further.

Although the case is effectively over and done with, we cannot ground our jurisdiction o the city's appeal from the order to pay interim fees on the existence of a final judgment winding up the entire litigation. Not only was no such judgment (it seems) entered, but no notice of appeal from it has been filed. The only notice of appeal is from the district court's order, issued back in 1984, directing the city to pay the plaintiffs forthwith the \$113,000 in interim attorney's fees that the court had previously awarded. If the 1984 order was not in some sense a final order we have no appellate jurisdiction over it just because, in the interim, the litigation has for all practical purposes come to an end.

Attorney's fees usually are awarded after the final judgment; since there is then nothing else pending in the district court, the fee award is a final order in an uncontroversial sense, appealable under 28 U.S.C. § 1291. The

order to pay interim fees that was issued in 1984 neither wound up the entire litigation nor was entered after the litigation had been disposed of by some other order.

Another unavailing possibility would be to regard the fee award as a pendant to the preliminary injunction. When an order is properly appealed, another closely related order that would not be appealable independently can be reviewed along with it if that is the most efficient way of proceeding. See *Parks v. Pavkovic*, 753 F.2d 1397, 1402 (7th Cir.1985), and cases cited there. This principle might have authorized the city to appeal from the original fee award, provided the appeal could be taken in time to be consolidated with the appeal from the preliminary injunction, which had been issued before the fee award was made. But the city did not attempt to appeal from that award. It waited till the court ordered it to pay the amount awarded. It was then too late to consolidate the fee order with the preliminary injunction—or, if not too late, still no effort at consolidation was made.

That leaves as the only possible route of appeal the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47, 69 S.Ct. 1221, 1225-26, 93 L.Ed. 1528 (1949). As conventionally formulated, the doctrine has three elements. The issues pertinent to the correctness of the order must not overlap those in the underlying litigation. The order must be definitive rather than tentative. And the harm it threatens to inflict on the party seeking to appeal must not be preventable by appealing at the end of the case; in other words, the appellant must show irreparable harm. If there is a unifying theme to the complex rules governing the appeal of interlocutory orders within the federal system, it is that such orders are appeal-

able only when they threaten irreparable harm. See, e.g., *Carson v. American Brands, Inc.*, 450 U.S. 79, 101 S.Ct. 993, 67 L.Ed.2d 59 (1981).

The three elements are well illustrated by the facts of *Cohen*, a shareholders' derivative suit. A state statute required the plaintiff in such a suit to post a bond to cover the defendant's costs in the event the defendant won. The district court denied the corporate defendant's motion to require the posting of a bond, holding that the statute was inapplicable to a suit in federal court. The defendant appealed. The Supreme Court held that the order denying the motion was indeed appealable. The denial was final, the issue resolved by it was unrelated to the merits of the derivative suit, and a final judgment in favor of the defendant would not repair the harm should the plaintiff not be good for the defendant's costs.

The Court's brief discussion has spawned an immense jurisprudence of collateral orders. See 15 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3911 (1976); *Id.*, 1986 Supp. Although the test first stated in *Cohen* remains canonical, as with so many multi-"pronged" legal tests it manages to be at once redundant, incomplete, and unclear. The second "prong" is part of the third. If the order sought to be appealed is not definitive, an immediate appeal is not necessary to ward off harm; there is no harm yet. The first "prong" seems unduly rigid; if an order unless appealed really will harm the appellant irreparably, should the fact that it involves an issue not completely separate from the merits of the proceeding *always* prevent an immediate appeal?

The incompleteness of the test comes from the fact that it leaves out of account the need to compare the irreparable

harm if an immediate appeal is not allowed with the irreparable harm if it is allowed. The Supreme Court's decision in *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 105 S.Ct. 2757, 86 L.Ed.2d 340 (1985), which held that orders disqualifying counsel in civil cases are not collateral orders, illustrates this point. Although such an order, like an order requiring burdensome discovery, can impose irreparable harm on a party who is not entitled to recover his costs of suit even if he ultimately wins, allowing an immediate appeal would disrupt the conduct of the trial and undermine the trial judge's responsibility for the management of the litigation. That is also why discovery orders can almost never be appealed.

Koller suggests an interpretation of the requirement of separability or "collateralness" different from and more functional than the conventional interpretation illustrated by such cases as *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1117 (3d Cir.1986): an order is collateral if an appeal would not interfere with the litigation in the district court. We interpreted "collateral" in this functional, pragmatic sense in *United States v. Dorfman*, 690 F.2d 1230, 1231-32 (7th Cir.1982), decided before *Koller*. An order that is collateral in this sense is appealable immediately if postponing appellate review till the end of the case would cause substantial irreparable harm to the party against whom the order was directed. The interim fee order in this case thus was collateral, and we shall therefore concentrate our attention on the question whether the city would have been irrevocably harmed by being forced to pay the interim fees and to wait till the end of the entire litigation before seeking their recovery through an appeal.

The district judge thought the city would not be able to show irreparable harm, see 596 F.Supp. at 1064; because we had held in *Mulay Plastics, Inc. v. Grand Trunk Western R.R.*, 742 F.2d 369 (7th Cir.1984), that a party against whom a monetary sanction is imposed for abuse of pretrial discovery cannot appeal from the sanction until the final judgment in the underlying suit. The appeal in *Mulay*, however, failed simply because the appellant could not show any irreparable harm from being made to pay his opponent immediately. He could appeal from the sanction at the end of the entire suit, and if he won the appeal his opponent would repay the money. See *id.* at 370. But if back in 1984 the City of Chicago had been forced to turn over \$113,000 in attorneys' fees to the plaintiffs, it might not have been able to get the money back by means of an appeal from a final judgment entered (say) in 1986. The class is a "revolving fund" of prisoners and defendants, and a class member who received attorney's fees in 1983 might very well no longer be a party in 1986, might be insolvent, might have disappeared—all three things might be true. If the entire \$113,000 were paid out to prisoners and defendants, the case would be very similar to *Cohen*, where denial of the defendant's motion to require the posting of a bond created a danger that the defendant would never be able to recover its costs of suit, to which it was entitled by statute if it won the suit.

If (but for this appeal) the fees would have been disbursed to the lawyers rather than retained by the prisoners and defendants, the problem would be less serious. Although the recipients would be nonparties, and the city asserts that to get its money back it would have to sue them for restitution, we assume that the district court has an in-

herent power to order attorneys to whom fees were paid over by their clients pursuant to court order to repay the fees should the order be reversed. But we do not think that back in 1984, when the city had to decide within thirty days whether to file a notice of appeal, it was required to investigate the fee arrangements between the plaintiffs and their attorneys in order to determine whose pockets the fees would end up in if the city complied with the order (which was to pay the plaintiffs, not their attorneys). To show irreparable harm it is enough to show that there was a danger—there was no more than that in *Cohen*—that the fees would disappear into insolvent hands.

So that the scope of our holding will not be exaggerated, we emphasize that the collateral order doctrine is not applicable merely because a discovery order or some other interlocutory order will force the party against whom it is directed to pay out money that he may not be able to recover by a final judgment in his favor. Most such orders are not even collateral within the meaning we derive from cases like *Koller*. Allowing the immediate appeal of such orders would bring on a regime of piecemeal litigation with a vengeance. But an order to pay fees is genuinely collateral; it can be appealed (provided the requirement of irreparable harm is satisfied) without any disruption of the proceedings on the merits. Certainly this appeal did not threaten or cause any interruptions, quite apart from the fact that the underlying proceedings have now petered out. The fact that the merits of order and the merits of the underlying litigation may be related is not decisive.

Notice, though, that it is the order to pay, issued in 1984, not the award itself, made in 1983, that makes the award appealable by virtue of the collateral order doctrine.

The city was not irreparably harmed by being told that it owed the plaintiffs \$113,000 but did not have to pay till further notice (the 1983 order). The threat of irreparable harm arose when the city was told to pay immediately, in circumstances where if the payment order was later held invalid the city might very well not be able to get all its money back.

Lest the term "interim order" convey an ineradicable impression of something tentative, subject to revision, and hence incapable of inflicting irreparable harm on the would-be appellant, cf. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468-69, 98 S.Ct. 2454, 2457-58, 57 L.Ed.2d 351 (1978); *In re UNR Industries, Inc.*, 725 F.2d 1111, 1118-20 (7th Cir. 1984); *Hastings v. Maine-Endwell Central School Dist.*, 676 F.2d 893, 896 (2d Cir.1982), we point out that the term is a misnomer as applied to the 1984 order. There was nothing tentative about it. As far as the district judge was concerned it was a final order to pay \$113,000. The reason he ordered immediate payment was that he could conceive of no set of circumstances, including reversal of his preliminary injunction, that would excuse the city from having to pay the fees incurred in getting that injunction. The order was not in his mind subject to any further revision. In this respect, and also because the city might not be able to get back the fees paid out under the district court's order at the end of the litigation, this case is different from *Hastings*, where the Second Circuit held that an award of interim fees was not appealable under the collateral order doctrine. The award there was tentative and in addition, as the court also noted, there was no suggestion that if the award were later reversed the defendant could not get its money back.

We turn at last to the merits of the fee award.

A district court has the power to award fees before the entry of a final judgment, *Hanrahan v. Hampton*, 446 U.S. 754, 757-58, 100 S.Ct. 1987, 1989-90, 64 L.Ed.2d 670 (1980) (per curiam), and this must mean—since the whole purpose of such an award is to enable the plaintiffs and their lawyers to see some cash before the entire litigation winds up—a power to order payment in advance of the final judgment. So we do not doubt that the district court had the power to make the order it did. But the order was valid only if the fee award was proper; and a fee award is proper “only when a party has prevailed on the merits of at least some of his claims.” *Id.* at 758, 100 S.Ct. at 1989. (In light of this holding, the plaintiffs’ reliance on *Kopet v. Esquire Realty Co.*, 523 F.2d 1005 (2d Cir.1975), which preceded *Hanrahan* and allowed attorney’s fees with respect to certain claims that were dismissed, is misplaced.) The plaintiffs, we now know, have lost this case; and when a judgment on which an award of attorney’s fees to the prevailing party is based is reversed, the award, of course, falls with it. The plaintiffs asked for a preliminary injunction, they got it, but this court threw it out. The only relief we allowed was an order (never actually entered by the district court, so far as we can determine) directing the city to retain its “street files” and allow convicted members of the plaintiff class to inspect them or information which they might use either to get their convictions overturned or to get damages for wrongful conviction. This relief was in the nature of a discovery order, that is, an order that gives a party a chance to obtain evidence or information useful to his cause. Such an order is worthless if discovery turns up nothing; indeed, it is worse than worthless, because then the party has incurred an expense without obtaining any benefit from it. That is what happened here. Upon reviewing the files the

plaintiffs' counsel were unable to find anything worthwhile. That is why they have allowed the case to peter out. They went on a fishing expedition, and the pond was empty. Maybe the city removed the fish, but at the moment that is just a slander (albeit a privileged one, because made in court). The relief that the plaintiffs obtained, after this court reversed the district court's grant of a preliminary injunction, was equivalent to a procedural victory won by a party who goes on to lose his case: a Pyrrhic victory. The Supreme Court held in *Hanrahan* that fees cannot be awarded for a procedural victory—in that case the reversal, on the plaintiffs' appeal, of directed verdicts for the defendants, and a remand for a new trial. 446 U.S. at 758-59, 100 S.Ct. at 1989-90. Yet the plaintiffs had not lost; they just had not won yet. The outcome was still uncertain.

Here, we now know, the plaintiffs lost—unless it is possible to win by losing, a proposition we reject. It is true that you can win a case by obtaining a settlement, even though one condition of the settlement might be the dismissal of the suit. See, e.g., *Maher v. Gagne*, 448 U.S. 122, 129, 100 S.Ct. 2570, 2574-75, 65 L.Ed.2d 653 (1980); *Harrington v. DeVito*, 656 F.2d 264, 266 (7th Cir.1981); *Gekas v. Attorney Registration & Disciplinary Comm'n*, 793 F.2d 846, 848 (7th Cir.1986) (per curiam). As a matter of fact all money settlements, and many other settlements as well, provide for dismissing the suit. See Fed.R.Civ.P. 41(a)(1); *McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir.1985). You can also win, we may assume without having to decide, if after some relief has been obtained the case becomes moot—is in effect interrupted before it can reach its normal conclusion (unless the plaintiff caused it to become moot). See, e.g., *Grano v. Barry*, 783 F.2d 1104, 1109 (D.C.Cir. 1986);

Comment, *Civil Rights Attorney's Fees Awards in Moot Cases*, 49 U.Chi.L. Rev. 819 (1982). In *Williams v. Alioto*, 625 F.2d 845, 847-48 (9th Cir.1980) (per curiam), for example, the plaintiffs obtained a preliminary injunction against "pat-down" searches conducted as part of a police operation called "Zebra." While the appeal from the injunction was pending, Operation Zebra ended, and the court of appeals dismissed the appeal and vacated the injunction on grounds of mootness. Far from having lost the case, the plaintiffs had won everything they sought: an injunction against searches conducted in connection with Operation Zebra. While the injunction was in force it conferred a benefit on the plaintiffs: it spared them the indignity of such searches. After the searches ceased, the plaintiffs had no further need for the injunction. The present plaintiffs, however, lost their case. They sought and obtained a temporary restraining order and preliminary injunction, but the only part of the relief granted by these two orders that survived the appellate process was ancillary to damage claims that have failed. The plaintiffs acknowledge that the case is now dead.

It might seem that unlike the situation in a damage action, where you have won nothing till you get a judgment and if the judgment is reversed on appeal you have nothing to show for the lawsuit, a plaintiff who obtains a preliminary injunction has won something even if the injunction is reversed; for unless it is stayed, it constrains the defendants' conduct until it is reversed. Indeed, from this standpoint it would make no difference whether the preliminary injunction was vacated as moot (as in *Williams*) or reversed. This line of argument is foreclosed, however, by our decision in *Ekanem v. Health & Hospital Corp.*, 778

F.2d 1254, 1258 (7th Cir.1985), which holds that a plaintiff who gets a preliminary injunction that is later reversed is not a prevailing party for purposes of an award of attorney's fees. See also *Smith v. University of North Carolina*, 632 F.2d 316, 346-53 (4th Cir.1980). In such a case the plaintiff has lost, whereas in a case that becomes moot after the preliminary injunction is entered the plaintiff has not lost; the injunction is vacated not because the plaintiff has failed to sustain his case but "to make sure that a decision of which the losing party was denied appellate review will not have preclusive effect in subsequent litigation between the parties," *CFTC v. Board of Trade*, 701 F.2d 653, 656-57 (7th Cir.1983).

The plaintiffs say they won in a practical sense because the city has stopped discarding exculpatory material in police department files. But at oral argument the plaintiffs' counsel conceded that if they had brought a damage suit against the city, and lost, and the next day the city had said, "Well, we won, but we think the plaintiffs have a point, and we have decided to change our procedures," there could be no award of attorneys' fees under section 1988. Or suppose (as in fact happened here) that a plaintiff gets an injunction to which he has no legal right but the defendant complies pending appeal, thus conferring a benefit on the plaintiff. As is apparent from *Ekanem and Smith*, this kind of benefit cannot support a fee award. "If it has been judicially determined that defendants' conduct, however beneficial it may be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense." *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978). This principle is dramatically illustrated by *Doe v. Busbee*, 684 F.2d 1375, 1381-83 (11th Cir.1982),

where the Eleventh Circuit denied any award of attorney's fees to plaintiffs who had obtained injunctions that, though later reversed, had while in effect enabled 1,800 women in the plaintiff class to obtain Medicaid-reimbursed abortions.

Mantolite v. Bolger, 791 F.2d 784 (9th Cir.1986), though questionable under *Hanrahan*, is in any event distinguishable from this case, since the plaintiff had prevailed on several substantive issues on appeal, although her right to ultimate relief had not yet been determined. The only relief the plaintiffs in the present case obtained that survived the appellate process was a procedural ruling which turned out to have no substantive value at all. *Jensen v. Stangel*, 790 F.2d 721, vacated and reh'g en banc granted, 795 F.2d 888 (9th Cir.1986), another recent Ninth Circuit decision, held over a strong dissent that an unsuccessful civil rights plaintiff who manages to fend off an award of attorney's fees to the defendant may obtain an award of attorney's fees for his success in the defendant's fee proceeding, viewed as a separate "civil rights" case in which the plaintiff is the prevailing party. We doubt that this is correct, and since the decision has been vacated we mention it only to show how extreme the plaintiffs' position in the present case is; for *Jensen*, even if good law, would not control a case such as this where there is only one civil rights case and the plaintiff loses it. Still another recent Ninth Circuit decision, *Clark v. City of Los Angeles*, 803 F.2d 987, 990-91 (9th Cir.1986), is also distinguishable from the present case, though again we are not at all clear that we agree with it. The plaintiffs brought a damage suit alleging harassment by the police. They won a substantial judgment but it was reversed because of an erroneous evidentiary ruling and the case was remanded for a new trial. The plain-

tiffs then dismissed the case voluntarily because the harassment had ceased. The court of appeals held that they were entitled to attorney's fees. The case was still in progress when the parties, in effect, settled it informally—the police stopped harassing the plaintiffs, and the plaintiffs stopped trying to get damages for past harassment. The suit was never determined to lack merit, as was the present suit. But see *Miami Herald Publishing Co. v. City of Hallandale*, 742 F.2d 590, 591 (11th Cir.1984) (per curiam) (“The Miami Herald’s suggestion that it has ‘prevailed’ because its claims were not rejected on the merits is ill taken”).

The civil rights attorney’s fees statute does not reward a plaintiff who brings an unmeritorious suit, merely because by some fortuity the suit brings about changes favorable to him. The coercive effect of litigation on a defendant is by no means entirely dependent on the litigation’s having merit, especially in a regime (the regime created by section 1988, as interpreted) which makes it easy for a winning plaintiff, but difficult for a winning defendant (see *Hughes v. Rowe*, 449 U.S. 5, 14-16, 101 S.Ct. 173, 178-79, 66 L.Ed.2d 163 (1980) (per curiam)), to obtain attorney’s fees. The idea that litigation can be a weapon for obtaining benefits irrespective of the merits of the litigation underlies the torts of malicious prosecution and abuse of process, as well as the antitrust principle, discussed in our decision in *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 471-73 (7th Cir.1982), that allows firms to complain about being harassed by lawsuits filed against them by their competitors. The plaintiffs in this case may have “won” in the *Realpolitik* sense in which a lawsuit can achieve its ends even if it has no legal merit, but the lack of merit is not irrelevant to a claim that the

other party—winner in law, though loser in fact—should be made to pick up the tab for the plaintiff's attorney's fees. This court has held these plaintiffs had no business bringing this suit, except insofar as they were trying to collect damages, which they have signally failed to do. The injunction aspect of the suit may have shaken the police department and caused it to make changes in record-keeping procedures but the fact remains that there was no legal basis for seeking federal injunctive relief except, as we have said, relief ancillary to a claim for damages that has turned out to be meritless too. Because the suit was not frivolous, the city (meaning the taxpayers) must swallow the costs of the defense. It is not, however, required to pay its opponent's costs. The suit was not ineffectual or frivolous, but it failed, and people who bring losing suits must bear their own attorneys' fees. See *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983).

When a suit that is "frivolous, unreasonable, or groundless" is settled before judgment, there will be no award of attorney's fees even though the suit helped the plaintiff in the settlement negotiations. *Harrington v. DeVito*, *supra*, 656 F.2d at 266-67. If the quoted words are intended as synonyms (as we treated them in *Gekas v. Attorney Registration & Disciplinary Comm'n*, *supra*, 793 F.2d at 849; see also *Hennigan v. Ouachita Parish School Board*, 749 F.2d 1148, 1151-52 (5th Cir.1985)), the implication is that the settling plaintiff need only show that the suit was not frivolous to avoid being denied fees because his suit lacked merit. Even so, when a suit goes through to judgment for defendants, or is abandoned as hopeless by the plaintiffs, the plaintiffs cannot be regarded as hav-

ing prevailed within the meaning of the statute even if their lawsuit was not frivolous (that is, so groundless that sanctions could be imposed for having brought it) and even if the suit brought about some or for that matter all of the changes in the defendants' conduct that the plaintiffs had sought. When a suit is settled, the district judge doesn't want to be bothered determining whether or not it has merit, merely to determine the ancillary question of attorney's fees; so he asks only whether the suit was non-frivolous, a simpler inquiry. But when the suit is not settled and ultimately fails, the judge has no need to make a separate inquiry into its merit. Merit has been determined; that determination controls the issue of attorney's fees.

We have difficulty understanding the force of the plaintiffs' argument that because the preliminary injunction was reversed on the authority of *Younger* rather than on the basis of a finding that the plaintiffs' constitutional rights had not been violated, the plaintiffs can somehow be regarded as prevailing parties. If you lose a case because the statute of limitations has run or because the court lacked subject-matter jurisdiction or because venue was improperly laid, still you've lost and are not the prevailing party. This case is distinguishable from *Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981, 984 (3d Cir. 1970), where the plaintiffs' suit was dismissed on jurisdictional grounds but was promptly refiled and reinstated, and where the filing of the suits was the catalyst for other successful suits in which the plaintiffs also participated and which produced the relief that the plaintiffs had sought in the two suits they had filed; or *Lampher*

v. Zagel, 755 F.2d 99 (7th Cir.1985), where after abstention the plaintiff prevailed in state court, then returned to the federal court and got a favorable judgment there too. The plaintiffs in this case brought suit in the wrong court and the suit was thrown out, for good, except for a discovery-type order which proved in the end to have no value. As a matter of fact it is now clear, as it was not when we reversed the grant of the preliminary injunction, that the plaintiffs' claim has no substantive merit, as well as having been brought in the wrong court. The claim depends on there being exculpatory material in the street files—and there isn't any. The suit has been abandoned because it has been shown to have, in fact, no legal merit.

The order to pay attorney's fees is reversed with directions to dismiss the fee petition. To help bring the underlying case to a close we suggest that the district court, on the basis of the representations made by the plaintiffs' counsel in this court, dismiss their motion to reinstate the case. One final point. After the argument in this case the plaintiffs' counsel submitted to the clerk of this court, with a request to distribute to the panel, a letter commenting on a case that the defendant's counsel had cited in oral argument and then in a letter to the court filed under Circuit Rule 11. Rule 11 authorizes counsel, without obtaining the court's permission, to notify this court of pertinent and significant authority that comes to counsel's attention after his brief has been filed or oral argument held. Rule 11 expressly forbids argumentation, and the defendant's letter complied with this stricture. Rule 11 does not authorize responses to Rule 11 submissions. Nor (what is the same thing) do our rules authorize parties

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to file, without leave of court, supplementary briefs following argument. The plaintiffs' letter of October 30 is an unauthorized brief; leave to file it should have been but was not requested. We trust that this violation of our rules will not recur.

REVERSED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

January 14, 1987.

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge

No. 84-2943

REUBEN PALMER, et al.,
Plaintiffs-Appellees,
v.

CITY OF CHICAGO,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

No. 82 C 2349
Milton I. Shadur, *Judge*.

ORDER

On December 10, 1986, plaintiffs-appellees filed a petition for rehearing with suggestion for rehearing en banc. All of the judges on the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing en banc. The petition is therefore DENIED.

DETECTIVE DIVISION
SPECIAL ORDER NO. 83-1

Subject

INVESTIGATIVE FILES

Date of Issue: 13 January 1983

Effective Date 3 February 1983

No. 83-1

Related Directives

Distribution

Amends

Rescinds

I. INTRODUCTION

This order is designed to institutionalize the control of all violent crime field investigation documents and files, which previously may have been referred to as working files, running files or detective's personal files and notes.

This order also provides for the maintenance and preservation of these documents by Detective Division field units.

II. PURPOSE

This order provides:

- A. guidelines for the proper retention of official Department reports, notes, memoranda and miscellaneous documents of potential evidentiary value accumulated during the course of a particular violent crime field investigation.
- B. guidelines for the proper preparation of a supplementary report.
- C. for the proper maintenance of Investigative Files and "R.D." numerical sequence files at the unit level by Detective Division personnel assigned to violent crime field investigation.
- D. specific instructions for the development and proper assemblage of all documents placed into a violent crime Investigative File.

- E. instructions for the inventory of all documents placed into an Investigative File Case Folder.
- F. guidelines to Violent Crimes Unit supervisors for the proper maintenance, storage and retention of Investigative Files.
- G. instructions for the use of the Investigative File Case Folder.
- H. instructions for the use of the Miscellaneous Document Repository.
- I. instructions for the use of the General Progress Report (CPD-23.122).
- J. instructions for the use of the Investigative File Inventory Sheet (CPD-23.121).

III. POLICY

It is the policy of the Chicago Police Department to conduct all criminal investigations in an impartial and objective manner and to maintain the integrity of its investigative files to ensure that the due process rights of the accused are not compromised during the subject investigation, initial court hearing or any subsequent reviews. Additionally, it is the policy of the Chicago Police Department to record and preserve *any* relevant information obtained by *any* detective during the course of a violent crime field investigation.

When assigned to violent crime field investigations, detectives will preserve and record information and materials obtained in the course of the investigation to assure not only that information and materials indicating the possible guilt of the accused are preserved, but also that any information and materials that may tend to show his possible innocence or aid in his defense is preserved.

Deviation from this policy adversely impacts on the goals and objectives of the Chicago Police Depart-

ment and may result in disciplinary action against that Department member.

IV. DEFINITIONS

A. Investigative File

An Investigative File is a criminal case file pertaining to a violent crime field investigation which contains official Department reports, notes, memoranda and miscellaneous documents generated by or received by any detective during the course of such investigation. This investigative file is designed to provide all parties engaged in a criminal proceeding including the judge, State's Attorney, Defense Attorney and the assigned Department members with a comprehensive account of the subject criminal case.

B. Investigative File Case Folder

An Investigative File Case Folder is an 8½" x 11" case folder complete with two (2) two-hole metal punch fasteners designed to secure all documents relating to the subject criminal case.

C. Miscellaneous Document Repository

A Miscellaneous Document Repository is an 8½" x 11" envelope which will be utilized as a receptacle for all items and documents which are not 8½" x 11" in size. This envelope will be fastened with a two-prong metal fastener to the right hand side of the Investigative File Case Folder. It will be the first (bottom) document on the right hand side.

D. Investigative File Inventory Sheet

An investigative File Inventory Sheet is a multi-lined 8½" x 11" sheet of paper with columns to identify each investigative document that is placed in the investigative file case folder. This form functions as the case index for all documents within the investigative file case folder.

IV. D. A copy of the form will be forwarded to the Records Division whenever felony charges are placed against a person(s) to ensure proper notice of all existing documents pertaining to the subject investigation can be made to the State's Attorney's Office, the courts and the defense counsel.

E. General Progress Report

A General Progress Report is a Department form, 8½" x 11" in size, which will be utilized by all detectives assigned to violent crime field investigations. This document is designed to standardize the recording of handwritten notes and memoranda (the investigative work-product) including: inter-watch memoranda (whether handwritten or typewritten), witness or suspect interview notes, on-scene canvass notes, and any other handwritten personal notes normally generated by investigating detectives during the course of a violent crime field investigation.

V. RESPONSIBILITIES AND PROCEDURES

A. The Violent Crimes Unit supervisors will ensure that:

1. an Investigative File Case Folder is initiated immediately in all violent crime field investigations listed below:
 - a. Homicides/Medical Examiner Cases
 - b. Police-related shooting incidents
 - c. Batteries likely to result in death
 - d. Rapes and Deviate Sexual Assaults
 - e. Any other major violent crime field investigation that the unit supervisor deems appropriate.
2. an Investigative File Case Folder is initiated for all violent crime field investigations which

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culminate with the arrest of the offender(s) and the approval of felony charges.

3. all submitted documents are reviewed and inserted into the Investigative File Case Folder and logged on the Investigative File Inventory Sheet when an Investigative File Case Folder exists.
4. In those cases wherein an Investigative File Case Folder has not been prepared, all submitted documents presented with each supplementary report are reviewed and that those documents are attached to the photocopy of the original case report in the unit's R.D. numerical sequence file.

B. Detectives are required to:

1. transcript relevant information which initially had been recorded upon General Progress Reports, Violent Crimes Major Incident Worksheets, and other miscellaneous investigative documents, on an official Department case report form (Supplementary, General Offense, etc.) consistent with the Detective Division Violent Crime reporting format.
2. submit all handwritten notes and investigative documents generated or received to the unit supervisor for review and inclusion in the Investigative File Case Folder whenever an Investigative File case folder *has been* initiated. (Normally at the end of each tour.)
3. preserve all handwritten notes and investigative documents generated or received and submit them to the unit supervisor with each supplementary report submitted whenever an Investigative File Case Folder *has not been* initiated.
4. assume responsibility for the contents of the investigative file folder and any documents

placed within the folder during his tour of duty.

Whenever a member of the Division removes the Investigative File Case Folder from the Watch Commander's office, the member will, in accordance with Detective Division Notice No. 82-2, "Detective Division File Control Log," sign the unit File Control Log book. The Unit File Control Log will also be signed by the member returning the Investigative File Case Folder. The Investigative File Case Folder will not be handed over to another Division member without recording this exchange in the File Control Log book.

C. The Violent Crimes Unit commanding officer will ensure that:

1. the proper maintenance of the unit's R.D. numerical sequence files and direct administrative control of all Investigative File Case Folders are achieved.
2. a copy of the completed Investigative File Inventory Sheet is forwarded to the Records Division whenever a violent crime field investigation results in a person(s) being charged with a felony.
3. all related documents, except original copies of supplementary case reports, are retained in unit files.
4. all notes, memoranda and miscellaneous documents of potential evidentiary value are retained in the Violent Crimes Unit's Investigative Files.

VI. VIOLENT CRIMES FILE RETENTION

The retention schedule for Violent Crimes Units' files is as follows:

A. Non-criminal incidents: One (1) year - Purged

- B. Cleared Misdemeanor incidents: One (1) year - Purged
- C. Unfounded incidents: One (1) year - Purged
- D. Exceptionally Cleared incidents: One (1) year - Purged
- E. Suspended incidents (except when warrants have been issued):
 - 1. Misdemeanors: 18 months - Purged
 - 2. Felonies: Three (3) years - Purged
- F. Cleared Felony: Until final court disposition - Purged
- G. Cleared/Closed Homicides: Until final court disposition and then forwarded to Records Division for permanent retention.
- H. Unsolved Homicides: Ten (10) years at Violent Crimes Unit and then forwarded to Records Division for permanent retention.
- I. Cleared/Open Homicides: Ten (10) years at Violent Crimes Unit and then forwarded to Records Division for permanent retention.

/s/ William Hanhardt, Chief
Detective Division

WH/pj